A

Satin Straits Sdn Bhd v Seng San Bing

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA22NCC-140–04 OF 2018
AZIZUL AZMI ADNAN J
6 DECEMBER 2019

C *Contract — Sale and purchase of shares — Breach — Plaintiff claimed that defendant knew of diminution in sales from key customers of companies and reasons thereof but failed to inform plaintiff — Whether defendant had knowledge regarding diminution of sales and reasons thereof — Whether defendant failed to communicate information to plaintiff — Whether there was breach of warranties — Whether plaintiff had proven loss suffered — Whether nominal damages ought to be awarded*

D

E *Evidence — Course of trial — Fresh evidence — Defendant filed application to adduce management accounts of companies — Whether management accounts related to defendant's pleaded case*

F The plaintiff and the defendant had entered into a share sale and purchase agreement ('the SPA') through which the plaintiff had acquired the whole of shares in two companies ('the companies') from the defendant. In the present case, the plaintiff sued the defendant for breach of the SPA premised on the assertion that the defendant knew of the diminution in sales from two key customers of the companies ie Cosway and Summit and the reasons thereof but failed to communicate this information to the plaintiff. However, the defendant denied this assertion. Further, the defendant filed an application under encl 96 to adduce the management accounts of the companies and an email from the defendant's solicitors at the time to the plaintiff's solicitors.

G

H **Held**, allowing the plaintiff's action in part, awarding nominal damages amounting to RM10,000 to the plaintiff, and dismissing encl 96 with costs of RM3,000:

(1) On the facts of the case, the court was satisfied that the defendant knew, prior to the completion of the SPA, that there had been a significant decline in the sales to Cosway and Summit. In the case of Cosway, the defendant also knew, prior to completion, the reasons for the decline. The failure of the defendant to communicate this information to the plaintiff amounted to a breach of the warranties contained in paras 6(p) and 2(b) of the warranties in schedule 5 of the SPA (see paras 7 & 27–28).

I

(2) The plaintiff failed to establish the loss that it had suffered due to the breach of the warranties under the SPA because: (a) the plaintiff did not plead the method by which it had derived the claim for RM18m in damages, which was fatal to its case; and (b) in any event, the evidence by the plaintiff's expert witness providing a valuation for the shares in the companies was manifestly erroneous due to the flaws in the logic, and the basis for valuation, employed by the witness. Based on the above reasons, the court awarded nominal damages in the amount of RM10,000 to the plaintiff (see paras 7, 49, 51 & 63–64).

(3) The court dismissed with costs the defendant's application in encl 96 to adduce the evidence of the management accounts of the companies and the email from the defendant's solicitors to the plaintiff's solicitors because the management accounts did not relate to the defendant's pleaded case. The defendant claimed to have no knowledge of the reduction in purchases by two important customers of the companies and had put the plaintiff to strict proof of its contentions. Having merely denied the existence of a contended fact and not put forward an affirmative case, it was not open to the defendant to seek to adduce evidence of that affirmative case (see paras 7 & 67–69).

[Bahasa Malaysia summary

Plaintif dan defendan telah menandatangani perjanjian jual beli saham ('SPA') yang mana plaintif telah memperoleh keseluruhan saham dalam dua syarikat ('syarikat-syarikat tersebut') daripada defendan. Dalam kes semasa, plaintif memfailkan saman ke atas defendan kerana melanggar SPA atas alasan bahawa defendan mengetahui mengenai pengurangan penjualan dari dua pelanggan utama syarikat iaitu Cosway dan Summit dan sebab-sebabnya tetapi gagal menyampaikan maklumat ini kepada pihak plaintif. Walaubagaimanapun, defendan menafikan dakwaan ini. Selanjutnya, defendan memfailkan permohonan di bawah lampiran 96 untuk mendapatkan akaun pengurusan syarikat dan e-mel dari peguam defendan pada waktu itu kepada peguam plaintif.

Diputuskan, membenarkan sebahagian tindakan plaintif, mengawardkan ganti rugi nominal berjumlah RM10,000 kepada plaintif dan menolak lampiran 96 dengan kos RM3,000:

(1) Berdasarkan fakta kes, mahkamah berpuas hati bahawa defendan mengetahui, sebelum SPA dimuktamadkan, bahawa terdapat penurunan penjualan yang besar kepada Cosway dan Summit. Dalam kes Cosway, defendan juga mengetahui, sebelum SPA dimuktamadkan, alasan bagi penurunan tersebut. Kegagalan defendan untuk menyampaikan maklumat ini kepada plaintif terjumlah kepada pelanggaran terhadap jaminan yang terdapat dalam perenggan 6(p) dan 2(b) jaminan dalam jadual 5 SPA (lihat perenggan 7 & 27–28).

(2) Plaintif gagal membuktikan kerugian yang dialaminya akibat daripada pelanggaran jaminan di bawah SPA kerana: (a) plaintif tidak memplidkan kaedah yang digunakan olehnya untuk memperoleh tuntutan ganti rugi sebanyak RM18 juta, kegagalan ini adalah fatal kepada kes plaintif; dan (b) dalam apa jua keadaan, keterangan oleh saksi pakar plaintif yang memberikan penilaian terhadap saham dalam syarikat-syarikat tersebut adalah jelas salah kerana kekurangan logik, dan asas penilaian, yang digunakan oleh saksi. Berdasarkan alasan di atas, mahkamah memberikan ganti rugi nominal berjumlah RM10,000 kepada plaintif (lihat perenggan 7, 49, 51 & 63–64).

(3) Mahkamah menolak dengan kos permohonan defendan di dalam lampiran 96 untuk mengemukakan keterangan akaun pengurusan syarikat dan e-mel dari peguam defendan kepada peguam plaintif kerana akaun pengurusan tersebut tidak berkaitan dengan kes yang diplidkan oleh defendan. Defendan mendakwa bahawa dia tidak mengetahui mengenai pengurangan pembelian oleh dua pelanggan penting syarikat-syarikat tersebut dan defendan menyatakan bahawa plaintif perlu mengemukakan bukti di atas dakwaannya. Dengan hanya menafikan kewujudan fakta yang dipertikaikan dan tidak mengemukakan kes yang afirmatif, defendan tidak dibenarkan untuk memohon untuk mendapatkan keterangan bagi kes affirmatif tersebut (lihat perenggan 7 & 67–69).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357; [2003] 2 MLRA 313, CA (refd)

Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward and another and another appeal [2015] SGCA 3; [2015] 2 SLR 395, CA (refd)

Eastgate Group Ltd v Lindsey Morden Group Inc (Smith & Williamson (a firm), Part 20 defendant) [2002] 1 WLR 642, CA (refd)

Infiniteland Ltd and another v Artisan Contracting Ltd and another [2006] 1 BCLC 632, CA (refd)

Konsortium Kopkad Sdn Bhd v Konsortium Koperasi Pengguna Malaysia Berhad [2015] MLJU 1883; [2016] 3 AMR 238; [2016] 4 CLJ 168, HC (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)

Norwich Union Life Insurance Co Ltd v Qureshi and another; Aldrich and others v Norwich Union Life Insurance Co Ltd [1999] 2 All ER (Comm) 707, CA (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ

465; [1998] 1 CLJ 793, FC (refd)
Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All ER 1167, KB (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Robinson v Harman [1843–60] All ER Rep 383; 1 Exch 850 (refd)
Sakthivel Punithavathi v PP [2007] 2 SLR(R) 983; [2007] 2 SLR 983, HC (refd)
Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd) [1999] 2 Lloyd's Rep 423, CA (refd)
Sycamore Bidco Ltd v Breslin and another [2012] EWHC 3443 (Ch), Ch D (refd)

Etrus Tan (Esther Ong with him) (Esther Ong Tengku Saiful & Sree) for the plaintiff.
Chew Chang Min (Mary-Ann Ooi Suan Kim, Jamie Wong, Jany Fang Chui Nee, Daryl Kong Kai Xuan, Aqilah Rossidi and Lee Wai Foon with him) (OS Kim & Assoc) for the defendant.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff in this case sued the defendant for breach of representations and warranties arising from a contract for the acquisition of shares. Although I found that the case for breach of contract had been made out, I only allowed nominal damages to the plaintiff.

FACTS

[2] The plaintiff acquired shares in L&S Cosmetics and Toiletries (M) Sdn Bhd and Citychemo Manufacturing Sdn Bhd ('companies') from the defendant. These shares represented virtually all the issued shares in the two companies. The transaction was documented in a share sale and purchase agreement ('SPA') dated 18 April 2013. The sale and purchase of the shares under the SPA completed on 1 July 2013.

The plaintiff's claim

[3] The plaintiff's pleaded causes of action was for the tort of misrepresentation and for breach of contract. Following trial, the tortious claim was abandoned.

[4] The plaintiff claimed, among others, that prior to completion of the SPA, two significant customers of the companies had significantly reduced

their purchases from the companies. According to the plaintiff, the defendant knew this fact, but did not inform the plaintiff. It was alleged that the failure to inform the plaintiff constituted a breach of the terms of the SPA, giving rise to a claim in damages against the defendant. It is to be noted that the plaintiff did not seek to rescind the SPA.

The defence

[5] The defendant denied that he knew that there had been a drop in purchases by the two customers, or that he knew the reason for such drop in sales. The plaintiff was put to strict proof of its claims.

The defendant's application to adduce new evidence

[6] More than a month after trial (but before the date fixed for oral submissions), the defendant made an application in encl 96 to adduce the management accounts of the companies and an email from the defendant's solicitors at the time to the plaintiff's solicitors.

SUMMARY OF THE COURT'S FINDINGS

[7] The findings of the court in this case are summarised as follows:

(a) on the facts of the case, I was satisfied that the defendant had known of the diminution in sales from two key customers of the companies and the reasons for the decline of the sales from one of those customers, contrary to his assertions in his defence;

(b) the failure by the defendant to communicate this information to the plaintiff amounted to a breach of the warranties contained in the SPA, specifically:

(i) para 6(p) of the warranties in Schedule 5 of the SPA, by which the defendant represented that the business of the Companies has not been materially and adversely affected by the loss of any important client and that the defendant was not aware of any facts which were likely to give rise to any such loss; and

(ii) para 2(b) of the warranties in Schedule 5 of the SPA, by which the defendant represented that he did not know of any undisclosed fact that might reasonably affect the willingness of the plaintiff to proceed to completion.

(c) the plaintiff failed to establish the loss that it had suffered by reason of the breach of the warranties under the SPA because:

(i) the plaintiff did not plead the method by which it had derived the claim for RM18m in damages, which was fatal to its case; and

(ii) in any event, the evidence by the plaintiff's expert witness providing a valuation for the shares in L&S Cosmetics and Toiletries (M) Sdn Bhd was manifestly erroneous due to the flaws in the logic, and the basis for valuation, employed by the witness;

(d) accordingly, I awarded nominal damages in the amount of RM10,000 to the plaintiff; and

(e) I dismissed with costs the application by the defendant in encl 96 to adduce the evidence of the management accounts of the companies and the email from the defendants solicitors to the plaintiff's solicitors because the management accounts did not relate to the defendant's pleaded case. The defendant claimed to have no knowledge of the reduction in purchases by two important customers of the companies, and had put the plaintiff to strict proof of its contentions. Having merely denied the existence of a contended fact and not put forward an affirmative case, it was not open to the defendant to seek to adduce evidence of that affirmative case.

[8] The reasoning underlying these findings are explained in detail in the following paragraphs.

Representations, warranties and conditions distinguished

[9] As mentioned earlier, the pleaded cause of action for tortious misrepresentation was abandoned after trial, and the case proceeded entirely on the contractual claim.

[10] In any event, it was arguable whether the plaintiff could validly pursue the claim for misrepresentation in this case. In *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167 it was held that the common law cause of action for misrepresentation merged into a contractual right of action once the representations forming the basis of the complaint were incorporated into the contract subsequently entered between the parties.

[11] It is necessary to clarify the terminology used in cases involving breaches of representation, and to distinguish representations from warranties and conditions. A representation is a statement relating to factual matters, in this case set out in the SPA. A representation may also operate pre-contract, in that it induces a party to enter into contractual relations. A claim for breach of pre-contract representation is a tortious cause of action, the remedy of which is rescission of the contract. Thus, where a party is induced to enter into a contract on the basis of a representation, and the representation that has subsequently been established as false had not been included into the terms of the contract, that party's remedy lies only for actionable misrepresentation in

tort. If the representation has been incorporated into the contract, then following *Pennsylvania Shipping v Compangnie Nationale de Navigation*, the claim may only be sustained in an action on the contract.

[12] The term *warranty* is often used interchangeably with *representation*, but there is a fine difference. There are two ways in which a warranty may be distinguished from a representation. Like a representation, a warranty is often also a statement of fact, but is often also used to describe a state of affairs in the future, and is not limited to being a statement of fact existing at the time the statement of made. Thus, a vendor of a company may represent at the time of contract that the profits of a company are as reported in its audited financial statements. It may also provide a fresh representation to this effect as at completion of the sale and purchase of shares. In both circumstances, the representations relate to a state of affairs pre-existing at the time the statements were made. By contrast, a warranty may be provided as to a state of affairs that will exist at some point in the future. For example, the same vendor may provide what is commonly known as a profit guarantee. By this, he warrants that the profits in the company for an agreed post-completion period will attain a particular level, failing which the purchaser may be entitled, for example, to reduce the amount of retained consideration payable.

[13] The second way in which the term warranty may be distinguished from a representation is that a warranty connotes an obligation to indemnify in the event of breach. A representation, by contrast, linguistically relates just to the statement of fact that is said to be true. A warranty is slightly wider: it encompasses the representation, but also includes the promise to make whole the recipient of the assertion of fact if it turns out to be untrue or unfulfilled.

[14] The term warranty is also used in contradistinction to the expression condition. In this context, a warranty is a term the breach of which may give rise to a claim in damages, whereas the breach of a condition will entitle rescission or repudiation of the contract. Where the condition is not a condition precedent, the non-defaulting party may repudiate the contract and still claim damages against the defaulting party. By contrast, where the obligations of the parties are expressed to be subject to the fulfilment of a condition precedent, the parties may rescind the contract without liability for damages if the condition remained unfulfilled by its due date, unless the contract in question places the obligation to obtain fulfilment of the condition on one of the parties, in which case the non-defaulting party may be entitled to damages (but not on the usual measure of damages: see *Konsortium Kopkad Sdn Bhd v Konsortium Koperasi Pengguna Malaysia Berhad* [2015] MLJU 1883; [2016] 3 AMR 238; [2016] 4 CLJ 168).

[15] The foregoing discussion is slightly tangential to the issues under

consideration in this case, but was necessary in order to define the vocabulary employed in the analysis of this case.

Whether there was breach of the spa

The applicable principles

[16] The case of *Norwich Union Life Insurance Co Ltd v Qureshi and another; Aldrich and others v Norwich Union Life Insurance Co Ltd* [1999] 2 All ER (Comm) 707 provides authority for the principle that under the common law, there exists no general duty of disclosure in contract, save in contracts requiring utmost good faith of parties.

[17] It is nonetheless customary, in contracts for the sale and purchase of shares in a company, for disclosures to be made by the vendor to a prospective purchaser of a target company. The purchaser undertakes a due diligence exercise over the information that is disclosed by the vendor as well as over information that is available from public sources, such as company searches.

[18] Whether or not the disclosures made by the vendor operates to qualify or limit the operation of the representations and warranties contained in a contract for the sale and purchase of the shares is a matter for negotiation between the parties. In the present instance, the warranties were expressed to be so limited, by the opening words of Schedule 5 to the SPA, which provided that, among others, the disclosures in writing made to the plaintiff in the course of the due diligence exercise operated as an exclusion to the warranties (see A1/51 of the trial bundles). (The exclusion only applied to matters disclosed in writing to the plaintiff purchaser; the purchaser's own knowledge, actual or constructive, acquired through other sources did not operate to limit the warranties: see cl 8.1 of the SPA).

The pleaded defence

[19] The pleaded defence was that the defendant did not know about the drop in sales from two customers of the companies, Cosway and Summit. At trial, the defendant changed his position under cross-examination. He admitted to the fact that there was a significant drop of sales from Cosway and Summit, which were the two most substantial customers of the companies from January–June 2013, prior to the completion of the SPA.

[20] The defendant attempted to then show that the drop in sales had been communicated to the plaintiff through the due diligence report. However, the due diligence report was dated 23 November 2012. The report could not have

taken into account matters that occurred after this date. The drop in sales in this case occurred from January to June 2013.

[21] It is trite principle of law that, where a defendant puts a plaintiff to strict proof of his case and does not plead an affirmative defence, he would not be permitted, at trial, to advance an affirmative defence that departs from his pleaded case (see *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357; [2003] 2 MLRA 313), discussed in further detail at para 68 below). Hence, it was not open to the defendant to seek to prove that the drop in sales had in fact been communicated to the plaintiff, because his pleaded position had always been that he did not know about the drop in sales.

[22] Accordingly, all the plaintiff needed to do was to show that the defendant knew about the reduction in sales prior to the completion of the SPA and the reasons for such reduction. Once this was established, the plaintiff would have proven that there had been a breach of the warranties contained in the SPA, because the defendant, by his own pleaded case, stated that he did not know of the reduction in the sales.

The relevant provisions of the SPA

[23] Under the terms of the SPA, the defendant, as vendor, provided certain representations and warranties to the plaintiff as purchaser. By the terms of the SPA, these warranties were not only given at the time of signing of the SPA, but were also deemed to have been repeated as at the date of completion (see cl 8.2 of the SPA).

[24] There warranties included:

(a) a warranty that, between execution of the SPA and the date of completion, the defendant would keep the plaintiff informed of information in respect of the business, operations and affairs of the companies to such an extent and in such form and detail as the plaintiff may from time to time reasonably require (see para 7.2(ii) of Schedule 5 the SPA);

in this case, the plaintiff did not lead evidence as to the extent and manner in which the defendant was to keep the plaintiff informed regarding the business of the companies. As such, there was no breach of this particular warranty in the SPA; and

(b) warranties that there has been no material adverse change in the companies since 28 February 2012 (being the date of the unaudited accounts that was disclosed to the plaintiff immediately prior to the

SPA), and that the business of each of the companies has been carried on in the ordinary and usual course. Paragraphs 6(a), (b) and (p) of the warranties in Schedule 5 provided as follows:

> 6. Events Since the Balance Sheet Date
>
> Since the Balance Sheet Date:
>
> (a) there has been no material adverse change in the customer relations of each of the Companies or in the financial or trading conditions or the position, prospects, assets or liabilities of each of the Companies, and the Companies have not entered into any material transactions and have not incurred any liabilities except in the ordinary course of each of the Companies business;
>
> (b) the business of each of the Companies had been carried on in the ordinary and usual course;
>
> ...
>
> (p) its business has not been materially and adversely affected by the loss of any important client or sources of supply or by any abnormal factor not affecting similar businesses to a like extent and the Vendor are not aware of any facts which are likely to give rise to any such effects; and

(c) a warranty that the information that had been supplied to the plaintiff were true, complete and accurate in all material respects, and that the defendant has not withheld any information that might reasonably affect the decision of the purchaser to proceed to completion. The specific provisions of paras 2(a) and (b) of the warranties in Schedule 5 read as follows:

> 2. Recitals Disclosures And Other Information
>
> (a) All information given in this Agreement relating to the Vendor and/or the Companies is true, complete and accurate in all material aspects.
>
> (b) All written information knowingly given to the Purchaser and its respective professional advisers by the Vendor, their representative (s) or professional advisers, was when given and is at the date hereof true, accurate and complete in all material respects and there is no fact, matter or circumstances which has not been disclosed in writing (or otherwise) to Purchaser or its respective professionals advisers which renders any such information untrue, inaccurate, misleading in any material respect and there is no fact or matter concerning the Vendor, any of the Companies and its business and affairs within the knowledge of the Vendor which has not on the basis of the utmost good faith been disclosed in writing (or otherwise) to the Purchaser or its respective professional advisers which might reasonably affect the willingness of the Purchaser to proceed with completing the terms of this Agreement.

[25] As mentioned earlier, under the terms of the SPA, the warranties are deemed to have been repeated as at completion.

ANALYSIS AND FINDINGS

[26] The following were the specific findings of facts in this case:

(a) the fact that the defendant knew about the reduction in sales to Cosway and Summit prior to the completion of the SPA was proven. It was highly unlikely that he did not know of the sales figures on a month-on-month basis, as he was the owner of the companies and the principal person responsible for their day to day affairs. In addition, under cross-examination, the defendant conceded that he knew about the significant drop in sales (see NOE/221) (but attempted to explain that this was disclosed to the plaintiff in the course of the due diligence exercise, which, as explained, was a position that was at variance to the pleaded defence);

(b) the fact that the defendant knew the reasons for the decline in sales to Cosway was proven at trial. The defendant accepted, under cross-examination, that he had known about the reason for the loss of sales to Cosway prior to the completion date (see NOE/268); and

(c) although it was established in evidence that the defendant knew about Summit moving its orders to a manufacturing facility in Penang, the plaintiff failed to establish that the defendant knew this prior to the completion of the SPA. According to the defendant, he knew this only in September 2013, during a meeting of the Federation of Malaysian Manufacturers (see NOE/275).

[27] To summarise: the defendant knew, prior to completion, that there had been a significant decline in the sales to Cosway and Summit. In the case of Cosway, he also knew, prior to completion, the reasons for the decline.

[28] In my judgment, the failure by the defendant to communicate this information to the plaintiff amounted to a breach of the warranties contained in the SPA, specifically:

(a) para 6(p) of the warranties (reproduced at para 24(b) ante) by which the defendant represented that the business of the Companies has not been materially and adversely affected by the loss of any important client and that the defendant was not aware of any facts which were likely to give rise to any such loss; and

(b) para 2(b) of the warranties (reproduced at para 24(c) ante) by which the defendant represented that he did not know of any undisclosed fact that might reasonably affect the willingness of the plaintiff to proceed to completion.

[29] It was advanced for the defendant that the plaintiff was not entitled to claim for breach of warranties because it had proceeded to complete the sale and purchase of shares. This argument, in my view, could not be sustained because the SPA contained the usual clause providing for survival of the warranties despite the fact that completion may have taken place. Clause 8.1 of the SPA provided as follows:

8.1 Incorporation of Schedule 5

> The Vendor hereby represents and warrants to and undertakes with the Purchaser and its successors in title (with the intent that the provisions of this Clause 8 shall continue to have full force and effect notwithstanding Completion) in relation to the Company in the terms set out in Schedule 5.

[30] Accordingly, while the election on the part of the plaintiff to proceed to completion precluded it from subsequently rescinding or repudiating the SPA, it did not preclude a claim in damages for breach of warranties.

[31] In submissions, counsel for the defendant also sought to argue that the plaintiff failed to establish that the decline in sales from Cosway and Summit was 'material' for the purposes, and within the meaning, of the material adverse change warranties in paras 6(a) and (p) of the warranties. I was of the view that it was not competent for counsel to raise this argument in submissions because:

(a) the materiality or otherwise of the decline in sales had never been an issue raised in the pleaded defence; and

(b) more than just that, the issue of the materiality of the decline in sales was also never put to the main witness of the plaintiff, Mr Peter Smerling (PW1). The failure to put the defendants' case to the plaintiff in cross-examination offended the rule in *Browne v Dunn* (1893) 6 R 67 (HL) and meant that the issue was not competent to be raised in submissions subsequently. The scope of this rule was explained by Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770. Although this case was reversed by the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793 on other points, the decision of the Court of Appeal remains good law on this point) in the following terms:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect

> may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.
>
> If the failure to put one's case to the main witness for the opponent will result in an abandonment of one's pleaded case, then *a fortiori,* where the assertion was unpleaded in the first place, the issue also cannot be subsequently raised in submission.

[32] Having established that there had been a breach of the warranties contained in the SPA, the next question was whether the plaintiff was entitled to the damages that it claimed were due to it.

DAMAGES

The applicable principles

[33] The object of damages is to place the plaintiff in the position that he would have been if the contract had been performed, or in the present case, had there been no breach of the warranty (see *Robinson v Harman* [1843–60] All ER Rep 383; 1 Exch 850).

[34] In the case of an acquisition of shares, if the agreement in question does not provide for the mechanism by which the shares were to be valued, the court will have to determine the appropriate way to value the aforesaid shares (see, for example, the English Court of Appeal decision of *Infiniteland Ltd and another v Artisan Contracting Ltd and another* [2006] 1 BCLC 632). This is a determination of fact.

[35] The measure of damages in this case would be the difference in the warranted price of the shares and the as-is value of the shares. The warranted price is presumed to be the price actually paid by the purchaser, until proven otherwise: see the English Court of Appeal decision of *Eastgate Group Ltd v Lindsey Morden Group Inc (Smith & Williamson (a firm), Part 20 defendant)* [2002] 1 WLR 642) and the English High Court decision of *Sycamore Bidco Ltd v Breslin and another* [2012] EWHC 3443 (Ch)).

[36] In this case, what remained to be determined was the as-is value, that is, the price that would be paid by a purchaser on a willing buyer-willing seller basis, knowing the true state of affairs.

[37] Mr Chew, counsel for the defendants, submitted that a plaintiff claiming for breach of a representation and warranty in an acquisition of shares or business of a company must lead evidence to show the basis on which the plaintiff arrived at the contracted purchase price. Failure to do so, it was argued, was fatal to the plaintiff's case. He relied upon the Singapore Court of Appeal case of *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward and another and another appeal* [2015] SGCA 3; [2015] 2 SLR 395) as authority.

[38] In that case, Columbia Asia acquired the shares in a Singaporean company from three individuals, two of whom were the Hong brothers. This company was the holding company of an Indonesian company that owned the Gleni International Hospital in Medan. After completion, Columbia Asia discovered a liability for withholding tax in Indonesia. This liability was eventually assessed at more than seven billion rupiahs (which at today's exchange rates would be in the region of RM2m). The acquisition price for the shares was more than S$43m, or RM131m at current exchange rates. Columbia Asia sued the Hong brothers for breach of their contractual warranties.

[39] While the Hongs did not dispute that there had been a breach of the warranties, they disputed the quantum of damages that Columbia Asia sought to claim against them. Columbia Asia had sought to argue that it had used enterprise value to price the shares in the target company (ie a multiple of EBITDA (earnings before interest, tax, depreciation and amortisation)). Because the tax liability was understated, the EBITDA of the target company was correspondingly overstated.

[40] On the facts, the Singapore Court of Appeal found that the EBITDA multiple was not the sole consideration that Columbia Asia took into account in agreeing to the contracted price for the shares in the target company. Rather, Columbia Asia was induced to pay the price because the acquisition provided an opportunity to obtain a foothold in a good market as well as a means to sidestep Indonesian restrictions on foreign ownership of hospitals. The claim for damages was thus denied notwithstanding that the fact of breach of warranty was not in dispute.

[41] Before me, Mr Chew argued that *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* stood for the proposition that, if a plaintiff purchaser failed to lead evidence regarding the manner in which it had valued the shares in the target company, then its claim for damages for breach of warranty must necessarily fail.

[42] I disagree.

[43] The following passage from the judgment of Andrew Phang JA makes it clear that the method of valuation employed by the plaintiff purchaser would be a useful starting point, but the Court of Appeal did not go so far as to hold that the failure to lead evidence regarding the valuation methodology that was actually used by the plaintiff would in all cases be fatal to the plaintiff's case:

> [37] The value as is of the shares would be what a willing buyer would have paid a willing seller at the date of the transaction, knowing the true state of affairs. This issue was considered at some length in *Sycamore*, the facts of which are somewhat similar to the present case. The claimant had purchased shares from the defendants and discovered accounting errors in the company's profit and loss accounts after completion. Specifically, the turnover figure stated in the said accounts had been inflated by reason of the improper recording of certain compensation amounts as turnover. The purchaser claimed damages flowing from the breach of warranty that the company's profit and loss accounts were accurate. In his judgment, Mann J observed (at [405]), as follows:
>
> > ... The purpose of the valuation is to find what a willing purchaser would pay to a willing seller. There are various ways of conducting this investigation. In the absence of an apparent market from which a price can be derived, other techniques have to be used. Assuming a purchaser who would use a model like [the actual purchaser's] is one technique ... But the views of the actual purchaser and of another potential purchaser are not irrelevant. If the purchaser would have paid the same sum anyway, then that goes to value. If another purchaser is in the wind, so that the actual purchaser's price has to be beaten to secure the transaction, then that goes to value too.
>
> [38] As can be seen from the above passage, the valuation exercise is a multi-faceted and fact-centric one that does not give rise to the application of a uniform approach. An inquiry into how the actual purchaser valued the shares or would have valued the shares (had it known of the inaccuracies in the accounts) could, in the proper circumstances, be relevant to the question of value. Indeed, in the English Court of Appeal decision of *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 ('Senate') the court emphasised that the evidential starting point of the inquiry was how the actual purchaser had valued the shares and that the expert evidence on the appropriate valuation method cannot stand alone if it is significantly at variance with evidence of what actually happened (see *Senate* at [34] approving the decision of the judge below as cited at [27]). Therefore, in working out the value as is of the shares, the court will often look at the way the claimant purchaser valued the company as evidence of the way the market would value the property or business (see generally *Senate* at [34]).
>
> [39] However, Stuart-Smith U also found in *Senate* that this did not mean that the court was bound to adopt the method of valuation that the claimant purchaser had adopted. He observed that there may be circumstances where it would be appropriate to depart from the actual purchaser's valuation approach, particularly where the valuation experts had agreed on an alternative approach. This was the case in the English High Court decision of *ADT Ltd v BDO Binder Hamlyn* [1996] BCC 808 (at 878–879). Both experts had agreed that a discounted cash flow valuation could not be done and that if such calculations could not be done,

valuations of companies seen as going concerns usually proceeded by estimating maintainable profits and applying a price earnings multiple.

[40] The price that the actual purchaser would have paid if the proper accounts had been presented is also good, albeit inconclusive, evidence of the value as is of the shares. In *Sycamore*, the defendants had sought to adduce evidence that the difference in the turnover figure would have made no difference to the price that the actual purchaser would have been willing to pay. However, Mann J eventually found that the evidence adduced in this respect was equivocal and thus turned to the expert valuation evidence instead.

[41] As previously mentioned, the expert evidence cannot be significantly at variance with evidence of how the purchaser had actually valued the shares. When considering an expert's valuation evidence, the court will also look at the realities of commercial bargaining and market competition to determine if the valuation model used and the assumptions underpinning such a model could be said to reflect what a willing purchaser would pay a willing vendor. For example, in Sycamore, a 'haggle factor' was applied to the figure arrived at by the expert's model to take into account the commercial reality that this was a purchase of an attractive business with real perceived growth prospects (at [464]).

[44] The Singapore Court of Appeal in *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* referred to the English Court of Appeal decision in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd's Rep 423).

[45] That case involved a sale of business (ie the sale of assets and goodwill rather than a sale of shares in a company). It was established in evidence that the profits of the business had been overstated in the accounts given to the purchaser, the accuracy of which was the subject of appropriate representations and warranties in the acquisition documentation. The purchaser sought to claim damages. Its case was that it had applied a price/earnings ratio of 13.67 or around 14 in order to arrive at the contracted price, and with the diminution in earnings as a result of the overstated profits, the as-is value ought to be correspondingly reduced.

[46] At first instance, the trial judge found that the purchaser had not established that it had calculated the purchase price using a price/earnings multiple. It also did not plead any alternative method of valuation. The judge nonetheless proceeded to assess the as-is value of the business on the basis of an unpleaded valuation methodology, by reducing the goodwill of the business by £5m.

[47] The Court of Appeal allowed the seller's appeal, holding that the trial judge had erred in employing a valuation methodology that was not pleaded, and in respect of which the parties had not had the opportunity to lead evidence or to present arguments. Stuart-Smith U held:

A [W]hile we sympathise with the judge's view that having found that there was a breach of warranty and thinking that some modest loss should be attributed to it, he was anxious not to send the plaintiff away empty handed, we think that he should have resisted the temptation to do so. The plaintiff deliberately adopted a high risk policy of aiming at jackpot damages. We have little doubt that it was part of that B policy not to offer the judge a much more modest alternative.

[48] The case of *Senate Electrical* is apposite in the context of the present case because it provides high authority for the principle that all measures of damages that a plaintiff proposes to rely upon at trial must have been pleaded. The C Court of Appeal stated:

A plaintiff must plead the damage claimed and set out the method by which he arrives at the claim. An alternative approach should also be pleaded. In *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951]1 All ER 873; [1951] WN 205 at page 875 of the former report, Devlin J said: D

... in my view the special damage which is pleaded should make quite clear to the other side what measure of damage is being relied on. If the plaintiff wishes to say that the goods are valueless, the special damage will be pleaded in the way in which it was done in this case, but, if he also wishes to say that, if they are not E valueless, they have depreciated substantially in value, then it is his duty, I think, to plead in the alternative that they have depreciated in value and to set out the method of calculation by which he arrives at the figure claimed in the alternative, so as to enable the defendant to know what is the case against him and to obtain evidence for his defence.

F In our judgment the judge's approach was not covered by the pleading of para 25 of the Amended Statement of Claim.

The pleadings in the present case

G **[49]** In my view, the pleadings in the present case did not set out the method by which the plaintiff had arrived at its claimed damages. The plaintiff asserted that the loss suffered was RM18m, which was represented by the difference between the contracted price and the as-is price, but it did not explain in the amended statement of claim how this sum of RM18m was arrived at.

H

[50] The relevant passages of the statement of claim are reproduced below:

16. The plaintiff agreed the price of RM50,000,000.00 for the Shares because it evaluated the same to be RM50,000,000.00 based on the representation made to it and the information available to it. Had the said misrepresentation not been made I or the breach not been committed, the plaintiff would not have agreed to purchase (or purchased) the Shares or purchase them at a price of RM50,000,000.00.

17. The said misrepresentation and breach were material because in the absence of Cosway and Summit purchases, the profitability of the companies would be significantly different.

18. At the true state of affairs, the worth of the shares and any price for which the plaintiff would have agreed to purchase the same would have been approximately RM32,000,000.00 only or in any event a price much lower than the agreed price of RM50,000,000.00.

19. Thus, as a result of the misrepresentation and breach, the plaintiff suffered a loss of RM18,000,000.00 (as said in the preceding paragraph) or in any event a loss which is the difference in value between the agreed price of RM50,000.000.00 and the worth of the shares at its true state of affairs such that Cosway and Summit had by then already decided to scale down purchases as known to the defendant.

[51] The plaintiff's case thus failed on a point of pleading, based on the authority of *Senate Electrical*. In the following paragraphs, I nonetheless proceed to consider the evidence that has been adduced in this case.

The witnesses of fact

[52] No evidence was led as to how the purchaser had valued the acquisition in the first place. Even though the principal witness of the purchaser, Mr Peter Smerling, testified that the defendant had represented to him that the revenue of L&S Cosmetics and Toiletries (M) Sdn Bhd was RM59m at the material time, he did not testify how he arrived at the purchase price of RM30m. Did he use a valuation methodology employing an earnings multiple, such as price/earnings ratio? Did he value L&S Cosmetics and Toiletries (M) Sdn Bhd based on its expected return on assets? Was a cashflow-based methodology used? We do not know.

The expert report

[53] As explained above, the appropriate measure of damages in this case would be difference in the warranted price of the shares (which is presumed to be the price actually paid by the purchaser) and the as-is value of the shares. The as-is value is the price that would be paid by a purchaser on a willing buyer-willing seller basis, knowing the true state of affairs.

[54] The 'expert' in this case (PW3, Mr Teh Qing De) did not engage in such an exercise. He sought to establish a price higher than what was actually paid, the premise being that the value of the shares would have increased had the level of sales been sustained at historical levels. In other words, he did not seek to establish what a purchaser would have paid for the shares had the purchaser known about the diminution in sales, but rather how much more the shares would have been worth had the representations held true. The obvious difficulty with this approach is that the warranted price is presumed to be the contracted price, according to the established authorities.

[55] In order to demonstrate this point, it will be necessary to analyse Mr Teh's report.

[56] At C2/8 of the trial bundles, Mr Teh calculated the 'loss of profit' as being RM6,797,000. This was derived by comparing the actual sales for the FY2013 to FY2015 against the sales for FY2012. He did not expressly explain how he derived the 'loss of profit' from the difference in revenue for those financial years, but it can be deduced that he applied the profit margin for FY2012 (13.44%) to arrive at the expected revenue differential. In other words, this portion of the report stated that, had the revenue been maintained at FY2012 levels for the next three financial years, and had the profit margin also been maintained at 13.44%, L&S Cosmetics and Toiletries (M) Sdn Bhd would have made additional profits of RM6,797,000.

[57] At p C2/9 he employed ROCE (return on capital employed) to measure the losses. He applied the ROCE figure for FY2012 (20.45%) to the capital employed in FY2013 and FY2014, in order to derive the expected returns for FY2013 and FY2014, had the ROCE figure remained the same for those financial years. 'Capital employed' was not expressly explained, but can be derived by: non-current assets + current assets — current liabilities. He then compared those expected returns against the actual returns attained, to arrive at a deficit of RM13,225,000.

[58] This was then added to the 'loss of profit' figure derived at C2/8 (explained at para 56 above) to arrive at a total impairment of goodwill of RM20,022,000.

[59] The issues I have with the valuation provided were:

(a) there is a conceptual difficulty in adding up expected 'losses' derived from using different formulae. If he used historical ROCE to calculate an expected loss, he cannot also calculate the expected loss using an historical profit margin percentage and then simply add these figures up. They are alternative methodologies, and the use of them in combination would be double counting and manifestly erroneous. To use a simple analogy, it would be like estimating the height of a building using, say, a laser rangefinder, and then also by measuring its shadow on the ground, but then inexplicably adding the two estimates together to arrive at the final result. There was no coherent logic behind the approach adopted by the expert witness;

(b) what Mr Teh did was, firstly, to calculate what the expected profits would have been for FY2013 to FY2015 had the revenue, profit margin and ROCE been maintained at FY2012 levels. He then compared the result with the figures contained in the actual accounts, and claimed the difference.

What he ought to have done was to show how much a purchaser would have

paid for the shares in the Companies as at the completion date had the purchaser known about the true level of the sales in the companies. Thus, the starting position ought to have been, using the same methodology that the plaintiff applied in valuing the shares for the purposes of the SPA, what would have been the purchase price had the purchaser known about the drop in sales?

The manner in which Mr Teh sought to calculate the 'as-is' value of the shares was not in accordance with the principles set out the applicable case law, as discussed at paras 35 and 36 ante; and

(c) allied to the preceding point was that the plaintiff sought to claim for reduced profits for three years *after* the completion date of the SPA. The correct approach would have been to value the shares *as at the completion date,* in order to ascertain the 'as is' price.

[60] In this case, only the plaintiff called a witness to provide expert opinion evidence. Now, while it is axiomatic that the court may not substitute its views for that of an uncontradicted expert, the court should also not unquestioningly accept unchallenged evidence (see *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983; [2007] 2 SLR 983). The Court of Appeal in the case of *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337) formulated the applicable principles in the following manner:

> [In] our view, a judge who is not an expert himself, should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.

[61] In this case, I am of the view that the opinion of Mr Teh Qing De (PW3) was obviously indefensible for the reasons explained in the preceding paragraphs.

[62] Mr Chew for the defendant further submitted that Mr Teh Qing De was not in fact an expert. Given my findings in the preceding paragraphs, I was of the view that this point was moot.

Summary

[63] Even though it was proven through the evidence that was received at trial that there had been a breach of the warranties contained the SPA, the plaintiff failed to establish the loss that it had suffered by reason of that breach, for the following reasons:

(a) the plaintiff did not plead the method by which it had derived the claim for RM18m in damages, which was fatal to its case; and

(b) in any event, the evidence by the plaintiff's expert witness providing a valuation for the shares in L&S Cosmetics and Toiletries (M) Sdn Bhd was manifestly erroneous due to the flaws in the logic and the basis for valuation employed by the witness.

[64] The failure by the plaintiff to establish its damage did not preclude me from a finding that *some* damage had been suffered as will justify an award of nominal damages. In awarding the sum of RM10,000 as nominal damages to the plaintiff, I relied upon the following passage in the judgment of Edgar Joseph Jr J in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.
>
> Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v Deveridge* [1825] 2 C & P 109 and *Twyman v Knowles* [1853]13 CB 222.

[65] I awarded costs of RM30,000 against the defendant.

APPLICATION TO ADDUCE NEW EVIDENCE (ENCL 96)

[66] In encl 96, the defendant sought to adduce evidence of the management accounts of the companies. This application was made after trial.

[67] I dismissed the application because the management accounts did not relate to the defendant's pleaded case. In para 6 of the defence, the defendant professed no knowledge of the reduction in purchases by Summit and Cosway for FY2013 onwards, and had put the plaintiff to strict proof of its contentions.

[68] Where a party to an action has merely denied the existence of a contended fact but has not put forward an affirmative case in his or her pleadings, it would not be open to that party, at trial, to seek to adduce evidence of that affirmative case. This was explained by the Court of Appeal in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 AMR 333; [2004] 1 CLJ 357; [2003] 2 MLRA 313 in the following terms:

> Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty

— whether in contract or tort — may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425 (folld), 428, Lord Evershed MR said:

> I think that a defendant — whether he is an underwriter or any other kind of defendant — is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging. Where such is the form of the pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged: and it is not therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case. The defendants are acting correctly if they follow the course adopted in this case — that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs seek to make good.

The result, where such is the form of the defence and of the issues raised, is no doubt such that the judges will watch carefully that defendants, first, do not attempt by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.

[69] With the defendant having put the plaintiff to strict proof of its contentions regarding the reasons for the drop in sales and that the defendant had known about these reasons, the defendant could not subsequently raise an affirmative case to rebut the contentions, which was that the drop in sales had been communicated to the plaintiff in the management accounts that were given to the plaintiff. According to the defendant, he had no knowledge regarding the reason for the drop in the purchases by Cosway and Summit (see para 7 of the defence), in which case he would not be permitted to simultaneously advance a case that, not only did he know about the drop in purchases and the reasons for the drop, but also that this information had been communicated to the plaintiff. The two positions were evidently mutually incompatible with one another.

[70] The defendant's application in encl 96 was thus dismissed with costs of RM3,000.

Plaintiff's action allowed in part; court awarded plaintiff nominal damages amounting to RM10,000; encl 96 dismissed with costs of RM3,000.

Reported by Dzulqarnain Ab Fatar